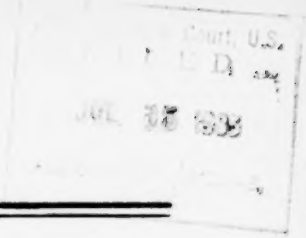
83-78



No. ———

IN THE

Supreme Court of the United States

October Term, 1983

PETER CHILDREN,

Petitioner,

vs.

JAMES R. BURTON, VICTOR DUNN and CITY OF CHARLES CITY, IOWA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

LEX HAWKINS
GLENN L. NORRIS
GEORGE F. DAVISON, JR.
HAWKINS & NORRIS
2801 Fleur Drive
Des Moines, IA 50321
Telephone: 515/288-6532
Attorneys for Petitioner

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

1. Does the Iowa Supreme Court's construction of probable cause for a warrantless arrest, which essentially give a peace officer in the State of Iowa the right to arrest a person on a general suspicion that the person is a criminal irrespective of whether the peace officer has *any* information that a specific crime has been committed, violate Amendments IV and XIV of the United States Constitution?
2. Has the Iowa Supreme Court erroneously equated the constitutional grounds for a warrantless arrest with grounds for a *Terry* stop [*Terry v. Ohio*, 392 U.S. 1, 34 (1968)]?
3. Did the Iowa Supreme Court err in stating that the defense of good faith lessens the standard of probable cause under the Fourth and Fourteenth Amendments to the United States Constitution?

Peter Children petitions for a writ of certiorari to review the judgment of the Supreme Court of Iowa in this case.

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

October Term, 1983

No. ———

PETER CHILDREN,

Petitioner,

vs.

JAMES R. BURTON, VICTOR DUNN and CITY OF CHARLES CITY, IOWA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

LEX HAWKINS
GLENN L. NORRIS
GEORGE F. DAVISON, JR.
HAWKINS & NORRIS
2801 Fleur Drive
Des Moines, IA 50321
Telephone: 515/288-6532
Attorneys for Petitioner

OPINIONS BELOW

The opinion of the Iowa Supreme Court (App. A, *infra*, p. A-1), reversing the judgment for petitioner in the district court, is reported at 331 N.W.2d 673 (Iowa 1983). The denial of a petition for rehearing is not reported.

JURISDICTION

The judgment of the court below (App. A, *infra*, pp. A-19-A-20) was entered on March 16, 1983. A timely petition for rehearing raising constitutional grounds was denied on April 18, 1983. (App. B, *infra*, p. A-23, App. C, *infra*, p. A-34). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Peter Children, Petitioner before this Court, was arrested without a warrant by Officer Victor Dunn of the Charles City, Iowa, Police Department on April 8, 1979. The arrest was made solely for an alleged indecent exposure at the Stevenson's store in a Charles City shopping center on January 25, 1979, occurring over two months previously. Children was never taken before a magistrate for a probable cause determination. Immediately after his arrest, the Charles City Police announced to the news media that they had arrested Children for indecent exposure, and that he was the "flasher" that had been plaguing the area. News stories concerning Children's arrest were published state-wide. Children was released from jail after his arrest and was never prosecuted for the alleged crime.

Subsequently, Children filed an action for false arrest in the Bremer County, Iowa, District Court for false imprisonment, naming Officer Dunn, Inspector James Burton (who helped process Children's arrest and aided in the detainment), and the City of Charles City as defendants. The case was tried to a jury and resulted in an award of $250,000 actual damages and $1,000,000 exemplary damages against all three defendants. Under Iowa law, the plaintiff establishes a *prima facie* case for false arrest when it is shown that the arrest was made without a warrant, and then the burden shifts to the defendants to establish that they had reasonable grounds for the arrest. *Children v. Burton*, 331 N.W.2d 673, 679 (Iowa 1983). Under Iowa law, "reasonable grounds" is equated with the traditional standard for "probable cause" as defined by the United States Supreme Court in *Brinegar v. United States*, 338 U.S. 160, 175-76 (1948), and following cases. "Reasonable

grounds" is also defined by Iowa statute, which states that a warrantless arrest can be made when an Iowa peace officer has:

> reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person arrested has committed it.

Iowa Code, § 804.7(3) (1979).[1] *Children v. Burton*, 331 N.W.2d at 679. The jury was instructed by the trial court as to this standard and found that the defendants did not have reasonable grounds or probable cause to arrest Children for indecent exposure.

Upon appeal, the Iowa Supreme Court held that Officer Dunn had probable cause to arrest Children as a matter of law, in a 6-3 split decision reversing the jury's verdict and dismissing the case. *Children v. Burton*, 331 N.W.2d at 682. Children filed a timely Petition for Rehearing before the Iowa Supreme Court on March 30, 1983, asserting that the majority has confused the grounds for probable cause for arrest with grounds for a *Terry* stop [*Terry v. Ohio*, 392 U.S. 1, 34 (1968)] and further that the court's construction of probable cause for a warrantless arrest violates Amendments IV and XIV of the United States Constitution. *See* Appendix B at p. A-23. On April 16, 1983, the Iowa Supreme Court denied Children's Petition for Rehearing, thus establishing the basis for this Petition for Writ of Certiorari. *See* Appendix C at p. A-34.

---

[1] The terms "probable cause" for purposes of the Fourth Amendment and "reasonable grounds," as used in various statutes, mean substantially the same. *Wong Sun v. United States*, 371 U.S. 471, 478 n. 6 (1963). The same standard as in Iowa Code § 804.7(3) (1979) is found in Fed. R. Crim. P. 4(a) and in 18 U.S.C. §§ 3050, 3052, 3053, 3056 and 3061 and in 26 U.S.C. §§ 7607, 7608(a) and 7608(b).

STATEMENT OF THE FACTS

In viewing the facts of the case, it must be borne in mind that a jury found the defendants not to have had reasonable grounds and probable cause for arresting Children for indecent exposure. The Supreme Court of Iowa conceded that the evidence, upon review, has to be viewed in the light most favorable to Children, the prevailing party. Further, if the pertinent facts on the issue of probable cause were in dispute, the issue was for the jury to decide. *Children*, 331 N.W.2d at 681.

On April 8, 1979, Officer Victor Dunn responded to a police radio dispatch from the Charles City, Iowa, Police Headquarters that there was an intoxicated person at the Cedar Mall, a small shopping center in Charles City, Iowa. While he was still en route, Officer Dunn received a second dispatch that the intoxicated person was an indecent exposure suspect. When he arrived at the Cedar Mall, a retail employee at the mall indicated to Officer Dunn that Peter Children was the object of the reports. At the time, Children was getting into his car with a friend, after having shopped for a time previous at the Cedar Mall.

Officer Dunn then asked Children his identity and ascertained that he was not intoxicated. Children identified himself as Peter Children from Mason City, Iowa. Children's friend corroborated Children's identity, established her own identity, and showed Officer Dunn a credit card that Peter Children had given her for her use, bearing his name. The automobile was also registered to Peter Children. Officer Dunn was satisfied that Peter Children was who he said he was, and so indicated at trial:

> Q. Was there any doubt in your mind at this time who he was?
>
> A. A little bit, yes, not a whole lot, though. I think he was telling me the truth about his name. (Tr., p. 166).

Children asked Dunn if Dunn wanted Children to come to the police station to ascertain his identity, but Dunn did not carry the inquiry further, testifying at trial:

Q. Why didn't you arrest him right then?

A. I didn't think I'd have enough probable cause. (Tr., p. 146).

Up to that time, Officer Dunn had not made any investigation of any indecent exposure incidents in Charles City or elsewhere. He testified at trial:

Q. You had never been involved in any of the investigations that preceded the arrest of Mr. Children; isn't that true?

A. That's correct.

Q. You had never interviewed any of the witnesses in any of the details of those prior indecent exposures; isn't that true?

A. That is correct.

Q. And June Temple had never told you that she had actually seen any exposure prior to April the 8th, 1979; isn't that true?

A. Yes, that is right.

Q. And on April the 8th, 1979, before you arrested Mr. Children, you never asked her whether she'd seen an exposure either; did you?

A. Yes, that is correct.

Q. Yes that is correct, you didn't ask her?

A. Yes.

Q. You knew prior to the arrest that you had to have all the elements of a crime in order to arrest, didn't you?

A. I knew that you had to have the elements, yes, but I didn't know about all of them.

Q. Well, you knew you had to have an exposure?

A. That's right.

Q. And you knew you had to have an identification?

A. That's right. (Tr., pp. 838-39).

In fact, Peter Children was a well-known businessman from Mason City, Iowa, a community approximately 25 miles distant from Charles City. Officer Dunn knew that some indecent exposure incidents had been reported in Mason City and that the Mason City and Charles City police were cooperating in an investigation. The Mason City police had made a composite picture of an indecent exposure suspect, and Officer Dunn had seen the composites sometime previous to April 8, 1979.

Sometime prior to April 8, 1979, Officer Dunn had talked to June Temple about indecent exposure incidents. He testified at trial:

Q. And isn't it true that before April the 8th, 1979, you had talked to June Temple or she had talked to you, really I think it was, about these incidents?

A. Yes. She has asked me one time when I was patrolling through the mall if we had caught the subject yet or suspect.

Q. Now this was before April 8th?

A. As I recall, it was before April 8th.

Q. And she brought the subject up to you, "Had they caught the guy, yet"?

A. That's correct.

Q. And she was exhibiting some kind of interest in it, was she, at the time?

A. Yes, she was asking me if we had caught him.

Q. What else did she say in that regard, do you remember?

A. If my memory serves me right, I think she said about it reminded—it reminded her of—her of a school teacher, of her schoolteacher.

Q. O.K. At any time prior to April the 8th, 1979, when this incident took place, isn't it a fact that she had never told you or described to you what, if anything, she had ever seen?

A. That's correct.

Q. All right. Now, June Temple now so we all get the name right, is the name who ultimately pointed out Mr. Children in the parking lot on the day in question, right?

A. That's correct.

Q. All right. So prior to that day she had never discussed any of the details of what she saw or anything of that nature?

A. No. (Tr., pp. 139-40).

Prior to April 8, 1979, but not on April 8, Officer Dunn had also talked to Detective James Burton, who had investigated previous indecent exposure reports. The entirety of Dunn's testimony was that he had looked at the police logs immediately after reports were entered and that he had talked with Detective Burton, as indicated in the following passage from his testimony:

Q. Now, what about any notes or records that Detective Burton had kept in connection with exposures? Did he keep such records as that?

A. I imagine he did.

Q. Well, did you get any information from him in connection with exposures prior to April the 8th, 1979?

A. Yes, I did. I had talked to him face to face, and he had given me a description of the person that we were looking for.

Q. O.K. Was it primarily your duty to—to run down or investigate exposures and things of that nature?

A. No, it was not. (Tr., p. 814).

On April 8, 1979, immediately after Officer Dunn had indicated to Peter Children that he could leave the parking lot (because Officer Dunn believed he did not have probable cause), another employee at the mall, Patrick Hawk, came running out, and stated to Officer Dunn that June Temple of the Stevenson's women's clothing store had identified Peter Children as the "flasher". When testifying at trial in this regard, June Temple denied telling Pat Hawk that Children was the "flasher":

Q. Now, then in your conversation with Pat Hawk there, did you use the word either flasher or exposer?

A. No. (Tr., p. 698).

After being admonished by Patrick Hawk to arrest Peter Children for indecent exposure, and while Children was still in the mall parking lot, Officer Dunn went into the mall and asked June Temple, "Are you sure it's him?" and she said, "Yes, yes, I'm sure." Officer Dunn and June Temple then went to Children's car where Officer Dunn arrested Peter Children for indecent exposure at Stevenson's on January 25, 1979. He testified at trial:

Q. And so there isn't any question in this record at all when you arrested Mr. Children, you arrested Mr. Children for indecent exposure at Stevenson's?

A. Yes.

Q. You didn't arrest for indecent exposure at Spurgeon's, did you?

A. No. I was arresting Mr. Children—or I did arrest Mr. Children for the Stevenson's.

Q. Because you hadn't talked to anybody specifically or had any eyewitness identification from Spurgeon's up to this point, had you?

A. No, I had not.

Q. So I want to be crystal clear. You arrested Mr. Children for an indecent exposure at Stevenson's store on January the 25th, 1979, correct?

A. Yes.

Q. And that's what you put in the complaint that you drafted?

A. Yes.

Q. And then later on it was changed to Spurgeon's, right?

A. Yes. (Tr., pp. 848-49).

After Officer Dunn had arrested Peter Children and taken him to the Charles City Police Station, he called Detective Burton to help process Children. The record indicates that June Temple never told Inspector Burton that she had seen an exposure:

Q. O.K. Did Officer Dunn say to you in sum and substance, "Did you see this man's genitals or his penis or anything of that nature?

A. I don't remember.

Q. Well, this is important now. Do you remember him asking you that?

A. No, I don't.

Q. All right. Do you remember telling him at that time that, yes, I did see the man's penis or genitals?

A. No.

Q. In fact, you never did tell him that, did you?

A. No.

Q. And you never told Mr. Burton that either, had you, prior to that time?

A. No, I didn't. (Tr., pp. 723-24).

The majority opinion of the Iowa Supreme Court quotes a purported memo to the file of Detective James Burton:

> Stevenson's 1-25-79: June Temple. 5'8" - 5'9", dirty dishwater Blond Hair or Grey. 34 - 35 years old. Down on his knees with both hands inside his pants jacking off. (Ex. 25).

Children, 331 N.W.2d at 674. The majority implies that Dunn had seen this memo in the police record. The record clearly indicates that this memo was placed in the file by Officer Burton approximately *one year after the alleged exposure and nine months after the arrest.* June Temple denies that she saw an exposure or a man with his hands inside his pants masturbating, several places in the record. The fact is that Burton fabricated this evidence after this lawsuit was filed, as indicated in his testimony:

Q. So, you made this note up recording what June Temple said on that day a year after the incident, right?

A. Yeah. You can even see that on the 1-25-79 there was an 8 and I put it then to '79.

Q. O.K. So the incident happened on June—on April 8, 1979—excuse me—it happened on January 25, 1979, and so somewhere around January of 1980, this year, you put these two notes into the file; is that right?

A. I'm not sure the exact day, but it seemed like a year later.

Q. Of course, this is after the City had been sued, and you'd been sued?

A. That's correct. (Tr., pp. 315-16).

In regard to whether there was a memo in the police file regarding June Temple Officer Dunn testified:

Q. Didn't you go back and look through the file to see if there were any statements or anything?

A. Yes, yes, I did.

Q. And you didn't find any statements from June Temple, as I remember?

A. That's correct. (Tr., p. 271).

* * *

Q. Now, you arrested him for an indecent exposure at Stevenson's, correct?

A. That's correct.

Q. All right. But when you looked in the file at all of the indecent exposures, there was no statement in there by any witness on January 25, 1979, about Stevenson's was there?

A. No, there wasn't. (Tr., pp. 172-73).

At the Charles City Police Station, Officer Dunn and Inspector Burton filled out a complaint against Peter Children, charging him with indecent exposure at Stevenson's on January 25, 1979. The complaint was never filed, and when asked why, Officer Dunn testified at trial:

Q. And why didn't you file this with the magistrate?

A. I didn't think that what June Temple told me after our conversation by telephone at approximately 6 p.m. that evening that there was sufficient grounds that an exposure had occurred. (Tr., p. 817).

Subsequently, Inspector Burton filed a complaint charging Peter Children with indecent exposure at Spurgeon's on January 25, 1979. There was never a proceeding before the magistrate to determine probable cause for the arrest. The charge filed by Inspector Burton was never prosecuted. Subsequently, the charge was voluntarily dismissed by the City. In the meantime, shortly after the arrest, the Charles City Police, through its police chief, announced to the news media that Peter Children had been arrested for indecent exposure and that he was the flasher who had been exposing himself in the Mason City and Charles City area. The announcement was given state-wide publicity by newspaper, radio and television reports, resulting in substantial damage to Children's reputation and emotional stability and loss of his ability to carry on his business.

ARGUMENT FOR GRANTING THE WRIT

I. THE IOWA SUPREME COURT HAS DECIDED THE ISSUE OF PROBABLE CAUSE FOR A WARRANTLESS ARREST CONTRARY TO ALL APPLICABLE DECISIONS OF THIS COURT DEALING WITH THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This case has nation-wide importance because it deals with a situation faced by countless citizens who are ensnared in the first stages of the criminal process, but who are never prosecuted for a crime. Peter Children was arrested in public without a warrant and his arrest was given state-wide publicity by the police, to his great damage. The constitutionally-mandated probable cause determination by an impartial magistrate was never made, causing him the very damage for invasion of privacy which *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975), states is the root of the Fourth Amendment guarantee. A complaint charging him with the crime for which he was arrested was never even filed. Although a complaint was subsequently filed charging him, in conclusory terms, with a different crime, that complaint was never presented to a magistrate for a probable cause determination, and the charge was subsequently dropped voluntarily by the City. Another man ultimately was convicted, upon guilty plea, of a related incident of indecent exposure.

Review of the underlying constitutional principles involved here can only be had via a civil proceeding such as this case for false arrest. Although warrantless arrests are governed by the Fourth and Fourteenth Amendments, the criminal procedure itself does not assure that a person's right against war-

rantless arrest without probable cause is protected, because of this Court's holdings that illegal arrest or detention does not void a subsequent conviction. *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). Thus, unless there is a related issue involving seizure of property, confession, or admissions flowing from the illegal arrest, there is no opportunity for this Court to review the constitutional issues in a criminal or habeas corpus context. Absent review in this case, the Fourth and Fourteenth Amendment rights of the countless persons similarly situated to Peter Children here will continue to be violated without direct guidance from this Court.[2]

This is not an instance where the State of Iowa has developed procedural standards different from those contained in federal statute, rules of criminal procedure and case law concerning warrantless arrests. Indeed, the procedure and standards for warrantless arrest in Iowa are substantially identical to the federal standards and rules; the Iowa Criminal Code and the Iowa Rules of Criminal Procedures are substantially identical to their federal counterparts. *See* Appendix D. In

---

[2] Justice Jackson, dissenting in *Brinegar v. United States*, 338 U.S. 160, 181 (1948), aptly expressed his concern for the protection of such rights:

> Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

this case, the Supreme Court of Iowa stated that it was following *Brinegar v. United States*, 338 U.S. 160, 175-76 (1948), as its definition of probable cause. As does this Court, the Supreme Court of Iowa equates the expressions "probable cause" and "reasonable grounds" for arrest. *Children, supra*, 331 N.W.2d at 679; *Wong Sun v. United States*, 371 U.S. 471, 478 n. 6 (1963); *Draper v. United States*, 358 U.S. 307, 310 n. 3 (1959). *See United States v. Watson*, 423 U.S. 411, 415-17 (1975).

As quoted directly by the Iowa Supreme Court, *Brinegar* states:

> "Probable cause exists where the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

This Court, in *Brinegar*, went on to state:

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave

> law-abiding citizens at the mercy of the officers' whim or caprice."

Brinegar, 338 U.S. at 176. In confirming that *Brinegar* is still the standard for probable cause, this Court, in *Gerstein v. Pugh*, 420 U.S. 103, 120 (1976), stated:

> "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof."

Thus, *Brinegar* and *Gerstein*, together with numerous other cases decided by this Court, confirm that the constitutional standard as stated by the Fourth Amendment is the minimum standard by which warrantless arrest must be judged.

Although the mere absence of exigent circumstances, such as in this case, does not require that a warrant be obtained before the officer may make an arrest, *United States v. Watson*, 423 U.S. 411 (1975), this Court has expressed its concern that resort to the procedures for obtaining a warrant not be discouraged by "less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search," *Whitely v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 566 (1971), and has held that "the standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with

respect to the magistrate's assessment." *Id.* The standards to be applied in assessing a determination of probable cause were laid forth by this Court in *Giordenello v. United States*, 357 U.S. 480 (1958): the factual basis to support probable cause must show personal knowledge by the officer of the criminal matters, the source of his belief, and "any other sufficient basis upon which a finding of probable cause could be made." *Id.* at 486. The source of an officer's belief may be from hearsay information and does not need to reflect his direct personal observation of the circumstances. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964). The reliability and veracity of this information is to be subjected to a "totality of the circumstances" analysis, as enunciated by this Court in *Illinois v. Gates*, —— U.S. ——, 103 S. Ct. 2317, 2327-28, 2330 (1983). This standard lends itself readily to the traditional standard of review of a magistrate's probable cause determination, which is whether the magistrate in issuing the warrant had a substantial basis for concluding that a search would uncover evidence of wrongdoing, or that a crime had been committed and the defendant committed it.

The limits of the probable cause inquiry here are clearly defined by the testimony of Officer Dunn himself. Officer Dunn was a day shift patrolman. All investigation about indecent exposure incidents had been done by Detective Burton on the night shift. Officer Dunn had no specific knowledge of the incidents and had not talked to any witness to an exposure about the incidents. He had previously talked to June Temple about whether or not they had apprehended the exposer, but he had not talked to June Temple about anything she saw or whether, indeed, she had seen an exposure. He had seen a composite drawing made by the Mason City Police of a suspect. When he was called to the Charles City Mall by the

police dispatcher, he was told that the intoxication suspect was also an exposure suspect. He then stopped Peter Children, ascertained his identity, and ascertained that he was not intoxicated. Under anyone's standard of reasonable grounds or probable cause, Dunn did not have probable cause at that time, and he testified he did not believe he had probable cause. (Tr., p. 146).

Shortly thereafter, Officer Dunn arrested Peter Children on the basis of June Temple's identification that Children was the man in the store. After Officer Dunn had arrested Children and while he was at the police station, he checked the police files to determine what the files said in regard to June Temple. He found no statements by June Temple. (Tr., p. 271). Officer Dunn never filed a complaint against Peter Children charging him with indecent exposure. He testified at trial that, after talking with June Temple again, he did not think he had sufficient grounds that an exposure had occurred. (Tr., p. 817).

Thus, the issue of whether Officer Dunn had probable cause to arrest Peter Children turns on what June Temple told him at the Cedar Mall on April 8, 1979. This case does not involve actual eyewitness observation of a crime by the officer, nor does it involve hearsay testimony by an informant that a crime had been committed. Children exhibited no furtive actions and did not flee from the scene. Children was not a known exposure suspect previously. Officer Dunn did not proceed to make the arrest because of facts and circumstances previously given to him, or on the basis of reliance upon another's investigation. In short, none of the facts and circumstances that this Court, in its many cases, has held establish probable cause under the Fourth Amendment are present in this case.

The central passage in the holding of the Iowa Supreme Court with respect to probable cause in this case is:

> "Officers confronted with situations such as this one must make a decision. They do not have the luxury of detached reflection before they act. Nor can they conduct extensive investigation and cross-examination out on the street, to see that all the legal elements of the crime are satisfied. They should be judged in the real world in which they must function. We hold that this arrest was on probable cause."

Children, 331 N.W.2d at 682.

The trial court and the jury both determined that Officer Dunn did not have reasonable grounds for believing that a crime had been committed, because he did not even ask June Temple what she saw. He had no basis from previous investigation to know what June Temple saw. Officer Dunn testified that he did not even know what the elements of the crime were. The Supreme Court of Iowa placed some reliance on what Patrick Hawk told Officer Dunn, but Hawk saw no crime; he simply referred Officer Dunn to June Temple. It may be that in some instances, a police officer may be excused from obtaining a warrant even though he does not know whether all of the technical elements of a crime are present. But there is no case in this Court under the Fourth and Fourteenth Amendments holding that an officer may make a warrantless arrest without ascertaining the occurrence of the primary element of the crime.

In essence, the majority of the Iowa Supreme Court gives a police officer in Iowa the right to arrest a person on a general suspicion that the person is a criminal, irrespective of whether or not the officer has *any* information that a specific crime

has been committed. It has always been the holding of this Court that common rumor or report, suspicion, or even strong reason to suspect is not enough to permit an arrest. *Dunaway v. New York*, 442 U.S. 200, 211, 213 (1979); *Henry v. United States*, 361 U.S. 98, 101 (1959). The holding of the Iowa Supreme Court in this case is in violation of the rights of Peter Children guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution.

II. THE IOWA SUPREME COURT HAS ERRONEOUSLY EQUATED THE CONSTITUTIONAL PROBABLE CAUSE STANDARD WITH THE STANDARD FOR A *TERRY* STOP.

Since the inception of the *Terry* stop, *Terry v. Ohio*, 392 U.S. 1 (1968), this Court has drawn careful boundaries as to its use by law enforcement officials. *Dunaway v. New York*, 442 U.S. 200, 210 (1979); *Michigan v. DeFillippo*, 443 U.S. 31, 45 (1979) (Brennan dissent). As Justice Stewart stated in his dissent in *Michigan v. Summers*, 452 U.S. 692, 706 (1981), only two types of seizures do not have to be based on the Fourth Amendment requirement of probable cause: The "limited stop to question a person and to perform a pat-down for weapons when the police have reason to believe he is armed and dangerous" (the *Terry* line of cases), and the "brief stop of vehicles near international borders to question occupants of vehicles about their citizenship" *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (brief investigatory border stop for questioning regarding citizenship and immigration status). This concept has recently been expanded to include a third type of seizure: airport detention of luggage to search for narcotics under reasonable conditions, *United States v. Place*, —— U.S. ——, 51 U.S.L.W. 4844 (1983). In these three

categories of cases, the Court has recognized that the "common denominator of the *Terry* cases and the border checkpoint cases [and now the airport search cases] is the presence of some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects, and interest important enough to overcome the presumptive constitutional restraints or police conduct." *Summers*, 442 U.S. at 707 (Stewart dissent). Presumably these interests are, in the border patrol airport search cases, to protect the citizenry of the United States from an influx of illegal aliens and from illegal drug activities and, in the stop-and-frisk cases, to protect law enforcement officials acting in their normal course of duty.

The petitioner acknowledges the validity and importance of this lesser probable cause standard in such situations, but states that its application in a civil action for false imprisonment and in related civil rights actions is unconstitutional. The Iowa Supreme Court, in effect, has determined that the *Terry* grounds, as matter of law, should be applied in determining the validity of a warrantless arrest in Iowa.

This Court has recognized there are circumstances whereby a person may be briefly detained without the requisite probable cause to arrest, but has held that "any [further] curtailment of a person's liberty by the police must be supported by at least a reasonable and *articulable* suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (Emphasis supplied). This "reasonable and articulable suspicion" is not an "inchoate and unparticularized suspicion or 'hunch'" but is the "specific reasonable inference which [an officer] is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27.

The *Terry* standard creates an exception to the Fourth Amendment standard, permitting "limited intrusions on an individual's personal security based on less than probable cause." *Summers*, 452 U.S. at 698. *Terry* dealt with a stop-and-frisk situation which did not fit traditional "arrest" concepts, in that probable cause for arrest was not present, but rather only suspicious circumstances viewed by an experienced police officer. *Terry*, 392 U.S. at 4-6. This Court found such a stop-and-frisk intrusion was less severe than traditional "arrests" and declined to stretch the concept of "arrest" to cover these intrusions, instead treating them as a *sui generis* "rubric of police conduct." *Id.* at 20. As stated by the Court in *United States v. Brignoni-Ponce*, 442 U.S. 873, 881-82 (1975) (investigatory border stop), "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause.*" [Emphasis supplied.]

The ruling of the Iowa Supreme Court that Officer Dunn had probable cause to arrest petitioner Children was based on the lower standard of a *Terry* stop. Officer Dunn did not observe any suspicious activity. When he received the call to come to Cedar Mall, he was responding to a report that someone was being drunk and disorderly; then to a report of someone being a suspected "flasher". Dunn stopped Peter Children, as he could under *Terry*, and questioned him as to his identification and what he was doing. He determined Children was not drunk and was satisfied that Children was who he said he was. Officer Dunn had not observed any suspicious behavior, had not seen a crime and, indeed, did not even know the elements of the crime of indecent exposure. Children had reasonably complied with all of Dunn's requests. He was not

accused of committing an immediate crime, but one committed some months prior. The nature of the crime was sexual misconduct, which is offensive to society but is of no immediate danger to the public. Children was not fleeing a felony situation and this was not a "hot pursuit" situation. Officer Dunn simply made the arrest because an irate citizen (Patrick Hawk) felt Dunn was a derelict in not making an immediate arrest of a suspect.

The jury and the Iowa trial court looked at these facts and found that Dunn did not have grounds for probable cause for an arrest. Dissenting members of the Iowa Supreme Court found the evidence was sufficiently conflicting to warrant submission of the case to the jury on the question of probable cause. (*See* App. A, pp. A-20-A-23).

The whole basis behind the requirement of probable cause under the Fourth Amendment is to prevent exactly what happened to Peter Children. This Court has consistently expressed its concern that Fourth Amendment rights of individuals be protected:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law.

Union Pac. R. Co. v. Botsford, 414 U.S. 250, 251 (1891). To allow the Iowa Supreme Court to undermine the probable cause requirement of the Fourth Amendment by giving its police officers a blanket license to arrest is to violate this basic right. Justice Blackmun, in his concurrence to *Michigan v. DeFillippo*, 443 U.S. 31, 41 (1979) (Detroit stop-and-identify ordinance), clearly identified that:

> There is some danger . . . that the police will use a stop-and-identify ordinance to arrest persons for improper identification, that they will then conduct a search pursuant to the arrest; that if they discover contraband or other evidence of crime, the arrestee will be charged with some other offense; and that if they do not discover contraband or other evidence of crime, the arrestee will be released.

Justice Stewart, in his dissent to *Michigan v. Summers*, 452 U.S. 692 (1981), reiterated this fear, stating, "If the police, acting without probable cause, can seize a person to make him available for arrest in case probable cause is later developed to arrest him, the requirement of probable cause for arrest has been turned upside down. . . ." *Id.* at 709.

III. THE IOWA SUPREME COURT ERRED IN STATING THAT THE DEFENSE OF GOOD FAITH LESSENS THE STANDARD OF PROBABLE CAUSE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In holding that Officer Dunn had probable cause for the warrantless arrest of Peter Children as a matter of law, the Supreme Court of Iowa stated a principle of law that apparently controlled its decision, but which is totally inapplicable and erroneous under the Fourth and Fourteenth Amendments of the United States Constitution, under the facts of this case. It said:

> "In dealing with civil damage actions for false arrest, courts apply a probable cause standard less demanding than the constitutional probable cause standard in crim-

> inal cases. If the officer acts in good faith and with reasonable belief that a crime has been committed and the person arrested committed it, his actions are justified and liability does not attach."

Children, 331 N.W.2d at 680. While there are instances where a good faith belief in the lawfulness of his action would grant immunity to a law enforcement officer both under the common law and the United States Constitution, those instances are not applicable to these facts.

Pierson v. Ray, 386 U.S. 547 (1967), established a qualified immunity for state and municipal police officers in actions brought under 42 U.S.C. § 1983 and under common law false arrest. Qualified immunity was based entirely upon common law antecedents under the tort of false arrest. This qualified immunity has been extended generally to state officials by subsequent decisions of this Court. Recently, in *Harlow v. Fitzgerald*, —— U.S. ——, 73 L. Ed. 2d 396 (1982), this Court eliminated the subjective element of the defense good faith, but continued the objective element, that being that the defense of good faith would not be available to a state official if an official "knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the plaintiff." 73 L. Ed. 2d at 409. The Court went on to explain in other terms when the good faith defense was not applicable:

> "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."

Id. at 411. It is without dispute that a warrantless arrest without probable cause by a police officer in the State of Iowa was

contrary to the Fourth and Fourteenth Amendments of the Constitution, well prior to the incidents complained of in this case.

Recently, Justice White has again argued for the modification of the Fourth Amendment exclusionary rule to prevent application of the exclusionary rule when the police officers acted in good faith. He describes the types of Fourth Amendment violations that might be held to be in good faith, *Illinois v. Gates*, —— U.S. ——, 103 S. Ct. 2317, 2344 (1983):

> "There are several types of Fourth Amendment violations that may be said to fall under the rubric of 'good faith.' 'There will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appear to the officer and though reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. . . .' *Stone v. Powell*, 428 U.S. at 539-40, 96 S. Ct., at 3073-3074. (WHITE, J., dissenting). The argument for a good-faith exception is strongest, however, when law enforcement officers have reasonably relied on a judicially-issued search warrant."

Here, the warrantless arrest of Peter Children lacked probable cause for none of the reasons stated by Justice White. The Iowa criminal law on indecent exposure has not changed or been held unconstitutional. The arrest was not made with a warrant. The law of warrantless arrest did not change and reasonable men, i.e., a trial jury, have found that the arrest-

ing officer, Officer Dunn, did not have reasonable grounds for the arrest. Turning back to *Pierson v. Ray*, it appears that the issue of good faith in making the arrest is generally one for the jury, irrespective of whether the underlying action is based on 42 U.S.C. § 1983 or on common law false arrest. As in this case of common law false arrest, the defense of good faith under 42 U.S.C. § 1983 is an affirmative defense that must be pleaded by defendant official. *Gomez v. Toledo*, 446 U.S. 635 (1980).

There is no basis for a holding in this case that the arresting officer acted in good faith as a matter of law. Accordingly, there is no basis for the statement of the Supreme Court of Iowa that the Court will apply a probable cause standard less demanding than the constitutional probable cause standard in criminal cases. The constitutional probable cause standard is the lowest standard permissible. *Gerstein v. Pugh*, 420 U.S. 103, 120-21 (1975).

To hold, as the Supreme Court of Iowa has apparently done, that a police officer has only to meet a lower standard than the Fourth Amendment of the Constitution, would change the constitutional requirement of probable cause into one of *possible* cause. Probable means more likely true than not true. This is not to say that a police officer should be required to meet the standard of preponderance of the evidence in showing probable cause before a magistrate, because the standard of preponderance of the evidence has formal trial evidence ramifications which are inconsistent with the use of hearsay and written statements. Hearsay and written statements are normally and permissibly used to support a probable cause determination before a magistrate. Nevertheless, under the facts of this case, there are no evidentiary matters that a

magistrate might have considered, but which could not have been considered by a trial jury. The issue of probable cause here is confined solely to what Officer Dunn said and what June Temple said. June Temple did not tell Officer Dunn or any other Charles City police officer that she had seen a man expose himself. Officer Dunn did not ask her what she had seen. Officer Dunn did not even know the elements of the crime he was charging. It is impossible to conclude that a reasonable person would believe he had probable cause, when he did not make even the most basic and fundamental inquiry into the primary element of the offense.

If Officer Dunn had had a magistrate at hand at the moment of the arrest, Officer Dunn then and there would have had to answer the magistrate's hypothetical question posed by *Jaben v. United States,* 381 U.S. 214, 224 (1965): "What makes you think the defendant committed the offense charged?" First, Officer Dunn would have had to tell the magistrate that he did not know the elements of the offense. Second, after they had ascertained the elements, Officer Dunn would have had to tell the magistrate that June Temple never told him that she had seen an exposure, and in fact he had never asked June Temple whether she had seen an exposure. Finally, Officer Dunn would have had to tell the magistrate that he had looked at the Charles City police files and had found no record of any complaint by June Temple of an exposure on January 25, 1979 at the Stevenson's store. Upon these admissions of Officer Dunn, the magistrate would have had to have found that no probable cause existed for issuing a warrant for Peter Children's arrest.

Finally, it should be noted that a petit jury found that Officer Dunn did not have reasonable grounds for the arrest. This Court has consistently held that an indictment returned by a

grand jury conclusively establishes probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 117 n. 19 (1976), states: "The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution." The only people who have viewed the facts from the mouths of witnesses in this case, the trial jury and the trial court, have found that Officer Dunn did not establish probable cause for his warrantless arrest of Peter Children. A majority of the reviewing court disagreed, but only after selecting facts favoring the police officer, and ignoring the overwhelming unfavorable evidence. Three justices of the Supreme Court of Iowa disagreed with this selective marshalling of the facts and dissented. Peter Children's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution were clearly violated by the decision of the Iowa Supreme Court.

CONCLUSION

This petitioner, Peter Children, respectfully petitions that this Court issue a Writ of Certiorari to the Supreme Court of Iowa to review and redress these constitutional violations.

Respectfully submitted,

LEX HAWKINS
GLENN L. NORRIS
GEORGE F. DAVISON, JR.
HAWKINS & NORRIS
2801 Fleur Drive
Des Moines, IA 50321
Telephone: 515/288-6532
Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF IOWA

422
66367

PETER CHILDREN,

Appellee,

vs.

JAMES R. BURTON, VICTOR DUNN,
AND CITY OF CHARLES CITY, IOWA,

Appellants.

Filed March 16, 1983

Appeal from Bremer District Court—B.C. Sullivan, Judge.

Appeal from denial of defendants' motions for directed verdict, judgment notwithstanding verdict, and new trial in false arrest action. REVERSED.

Walter C. Schroeder, Mason City, for appellant Burton, Don W. Burington of Laird, Burington, Bovard, Heiny, McManigal & Walters, Mason City, for appellant Dunn, and Jim D. DeKoster of Swisher & Cohrt, Waterloo, for appellant Charles City.

Lex Hawkins, Glenn L. Norris, and George F. Davison, Jr., of Hawkins & Norris, Des Moines, for appellee.

Considered en banc.

UHLENHOPP, J.

In this appeal we review a judgment for $1,250,000 awarded to plaintiff Peter Children in a false arrest action against two Charles City police officers—Victor Dunn and James R. Burton—and their employer, the City of Charles City. The officers and city appeal the trial court's overruling their motions for directed verdict, judgment notwithstanding verdict, and new trial.

Both sides presented evidence of the background of the arrest. In late 1978 and early 1979 a rash of indecent exposure incidents were reported in various Charles City and Mason City stores. They involved a man masturbating under racks of ladies' clothing. One individual appeared to be involved. Descriptions of the man seen in the stores were similar, his sexual acts were similar, the testimony refers to "the" suspect or flasher, and, indeed, one man was ultimately convicted. Regarding the Charles City incidents, the first occurred in December 1978 at a J.C. Penney store in Cedar Mall and was witnessed by Joyce Winters. On January 25, 1979, two further incidents occurred at Cedar Mall, one at Spurgeon's and one at Stevenson's. Sherry Tweed, a clerk at Spurgeon's, reported to Officer Burton at the store "That a man had been masturbating down by the—underneath this clothes rack, that he had gotten up and left the store." She later testified that this was based on a report by a customer that a man was lying between the racks playing with himself with his parts exposed and on Tweed's seeing the man pull up his zipper when he got up. The customer testified to seeing a man masturbating under clothes racks with his genitals exposed. June Temple, a clerk at Stevenson's, also reported an incident the same evening when a man came into the store twice. She stated to Officer Burton, "I just had some guy expose himself to me." At trial she testified:

> Q. I see. Did you or did you not tell him [Burton] that there was a man in there that exposed himself or words to that effect? [Objection, ruling.] The Witness: Yes, I did.

The police complaint sheet for this incident stated, "Red Owl, Gibson, Roberts, K-Mart Penneys Ref exposure at Spurgeons and Stevensons." Burton's memo for the police file stated: "Stevensons 1-25-79. June Temple. 5'8" - 5'9" Dirty dishwater Blonde Hair or Gray. 34-35 Years old. Down on his knees with both hands inside his pants jacking off." On February 7, 1979, Chris Rissler, another of Stevenson's clerks, reported a similar incident. Her description of the man matched previous ones. She reported to Officer Skillen, "From the desk she saw the man she was talking to earlier sitting by the floor—on the floor by the rack. He had his penis out and was masturbating."

Officer Burton, assigned to the night shift, headed up an investigation of these incidents. He also worked with the Mason City Police Department on the case. Officer Dunn, assigned to the day shift, was not involved in the investigation, as all the reported incidents occurred at night. Dunn was aware of the incidents, however, and of the ongoing investigation, and he had seen the police logs concerning the incidents. He had also seen a composite drawing of the suspect that the Mason City and Charles City police departments issued, and he had casually conversed with June Temple about the incidents. Dunn testified in answer to questions by Children's attorney on direct examination:

> Q. And isn't it true that before April the 8th, 1979, you had talked to June Temple or she had talked to you, really I think it was, about these incidents? A. Yes. She had asked me one time when I was patrolling through the mall if we had caught the subject yet or the suspect.

Q. Now, this was before April 8th? A. As I recall, it was before April 8.

Q. And she brought the subject up to you, "Had they caught the guy, yet?" A. That's correct.

On Sunday afternoon, April 8, 1979, June Temple, who had reported one of the January incidents, saw a man in Stevenson's whom she believed was the man involved in the January incident at Stevenson's. She went to Patrick Hawk, manager of Tradehome Shoe Store in the mall. Hawk testified:

Q. All right, now, in your own words, as best you can recall, what was said? A. She came into the store that day and asked us to call the police, the flasher was in Stevenson's. We—I asked her if she was—first I asked her if—if he was exposing himself, and she said no, he's just in the store; and I instructed one of my part-time people to call the police, and another employee, Dave Fisher, I asked to come with me. We wanted to go down and make sure this was the flasher.

He further testified:

Q. And if you'll tell me as best you recall what that conversation was. A. When we got out into the hallway and started down toward the Stevenson store, I asked, "Are you positive this is the flasher?" She said, "Yes, I'm positive it's him." We continued down the hallway until we got to the fountain, which is very close to the Stevenson's store, and she pointed the man out and said, "That's him. That's the flasher." Again, I asked her, "Are you positive it's him?" She said, "Yes, I am. That's the flasher."

Dave Fisher, a Tradehome employee, testified regarding this occurrence:

Q. And at that time you didn't know why they—beg your pardon? A. I knew June came down. I believe she came down now and said that there was a flasher in her store.

Q. Now, wait a minute. Let's back up a little bit. June came down, and did you hear her say something then? A. Yes, I did.

Q. And what did you hear her say? A. She said that the guy that she thought was the flasher was in the store.

Q. And who was she talking to? You or someone else? A. She was talking to Pat Hawk.

Hawk also testified that two telephone calls were made to the police. He instructed Jim Wandro, a part-time employee, to call the police, but Wandro erroneously reported the presence of an intoxicated person to the police. Hawk himself called back to the police dispatcher. He testified that he told the dispatcher June Temple had identified the man in their store as the flasher and that he requested a policeman immediately, and the dispatcher responded that someone was on the way.

The dispatcher testified:

Q. And you just tell me as best you recall what was said to you by someone. A. It was—came from the Tradehome Shoe Store, and he said that there was somebody acting strange and that they were possibly intoxicated.

Q. And what did you do in response to that? A. I called Officer Dunn by radio and advised him that there was an intoxicated person at the Tradehome Shoe Store.

Q. And tell me if you can from memory or from your log what time you called Officer Dunn and told him that? A. That would have been about 4:10 p.m.

Q. Okay. Did you get a later call from someone at the mall? A. Yeah, about 4:11 got another call back.

Q. Now, was that the same person or do you know? A. I don't know.

Q. And what was the conversation that you got or had with that person? A. Well, they advised that the person that was called in about being intoxicated was—had been identified by a clerk as the exposure subject.

Q. Exposure subject, did you say, or suspect? A. Suspect.

Q. All right. Did you misspeak? A. Misspoke.

Q. All right. And then what did you do in response to that? A. I called Officer Dunn back by radio and advised him of the change in the call.

Q. And what did you tell him as best you recall? A. I advised him that the intoxicated person call was the exposure suspect, and they just left by the south door.

When Dunn arrived at the mall parking lot, Patrick Hawk pointed out Peter Children to him. Children was in a nearby car, and Dunn approached to investigate. After talking with Children and his companion, Elizabeth Conway, Dunn ascertained that Children was not intoxicated. Children was in the driver's seat, but he could not produce a driver's license or other identification. Dunn asked if Children would accompany him to the police station. Upon Children's refusal, Dunn did not press the matter and let Children go on the condition that Mrs. Conway, who did have her driver's license, would drive.

Dunn then went to the mall entrance where he met Tradehome manager Hawk. Hawk asked Dunn why he let Children go, and relayed to Dunn that June Temple had identified Children as the flasher. Hawk testified as to events following his call to the police:

Q. Very well. All right. Now, after you had done that, what did you do? A. I came back out of Wandro's. Dave Fisher in the meantime had followed Mr. Children out and copied down his license plate number; and when I was coming out of Wandro's, Mr. Dunn was coming into the mall. I approached Mr. Dunn and said, "What are you doing? That guy's the flasher. Why didn't you arrest him?" And he asked me who had told me this, and I said June Temple, and he immediately went into Stevenson's, and I followed him into Stevenson's.

Children's attorney elicited these events on direct examination of Dunn at the trial:

Q. Okay. Just tell the jury what happened after you got in the mall. A. Pat Hawk, the manager of Tradehome, came up and said, "What'd you leave him go for? He's the flasher. June recognized him."

Q. Then what did you say? A. I just looked at him. I just walked by Stevenson's, and I asked—or June Temple was there along with Sally Snyder, and so I asked her—I asked—I said, "Are you sure it's him?" and she said "Yes, yes, I'm sure." I asked her if she could identify him and she said she could, so we walked back out of the south entrance and about that time the vehicle was moving. Miss Conway was driving, so I stuck out my hand and she stopped, and I walked over to the vehicle or around in front of the vehicle to the passenger side where Mr. Children was riding, and I think I knocked on the door then or the window. I looked at June Temple, and I said, "Is this the man that was in the store?" and she said, "Yes," and at that time I placed Mr. Children under arrest.

Q. Now, did you tell me when I took your deposition that Mr. Hawk had made those statements to you? A. Yes, I did.

Q. You did. As I understand it, you said to June Temple—what did you say to her when you walked up to her? A. I said, "Are you sure that it's him?"

Q. That's exactly what you said? A. Yes, sir.

Q. "Are you sure that it's him?" A. Positive.

Q. And she said what? A. "Yes."

Q. Is that all the conversation you had with her at that time? A. No. I asked her if she could identify him.

Q. Okay. A. And she said yes.

Temple's version of this conversation with Dunn was as follows:

Q. And tell me what the conversation was then. A. He wanted me to go out and identify the man.

Q. Did he say anything more to you than that? A. I don't remember.

Q. Did you then go with him? A. Yes.

Q. And just tell me what was said between you and Officer Dunn. A. He asked me if that was the man that was there on January 25th, and I said yes, it was.

Q. You—you when you went out with him, did you see Peter Children then in his car? A. He got out of his car, yes.

Q. And was Mrs. Conway with him at that time? A. I don't remember.

Q. Don't remember. How close did you get to him at that time? A. Two feet.

Q. Okay. Was there any doubt in your mind that that was the same man that you saw in your store on January 25th of 1979? A. No.

This was the point at which Dunn placed Children under arrest.

Dunn transported Children to the police station and Mrs. Conway followed in Children's car. Upon arriving at the station, Dunn phoned Burton, as he knew Burton was heading up the investigation. Burton arrived shortly and helped Dunn process the case. Dunn and Burton signed a complaint charging Children with indecent exposure based on the Stevenson's incident, but this complaint was not filed. Chris Rissler viewed Children and stated he was not the suspect, but Temple adhered to her identification. A magistrate was called to set Children's bond, but when a Charles City friend of Children arrived at the station to vouch for him, the magistrate gave permission in a second call for Children's release on his own recognizance. Children and Mrs. Conway left the police station and returned to Mason City. Children was detained approximately an hour and twenty minutes.

While the following events occurred after Children was released, we will state them to relate what ultimately happened. Later on the evening of April 8, Dunn checked the statutes and ascertained that indecent exposure requires actual exposure of the genitals or pubes. Iowa Code § 709.9 (1979). June Temple gave the police a written statement of her knowledge of the incident she witnessed at Stevenson's. After reviewing it, Dunn became concerned that Temple had not in fact seen an exposure. He went through the file and then contacted Temple again. She confirmed that she had only seen the suspect rubbing his genital area over his clothing and had not actually seen him expose himself. At the subsequent trial Temple described similarly what she had actually seen in January in Stevenson's when a man came into the store twice:

Q. Well, you say something unusual happened there. How did you first know about it? A. Well, he came into the store acting funny.

Q. All right. Now, this was— A. Nervous.

Q. This was a man that came in the store, right? A. Yes.

. . . .

Q. Okay. And where did you observe him go from there? A. He went to the back of the store.

. . . .

Q. All right. All right. When was your attention next directed to him after he came back a second time? A. I went up to the desk to get something for marking, and I noticed him in the mirror.

. . . .

Q. Okay. And what caught your attention to him then after he came back a second time? A. I noticed him in the mirror kneeling down.

. . . .

Q. And what did you do when you saw that? A. I was shocked so I turned away.

. . . .

Q. And, in your own words, what was he doing? A. He was—had his hands on top of himself.

. . . .

Q. And where in relation to his genitals were his hands? A. They were right on top.

Q. All right. From your vantage point, can you tell whether or not his zipper was zipped up or zipped down? A. I couldn't tell you.

Q. From your vantage point, could you tell whether his penis were exposed or were not exposed? A. I couldn't tell.

Q. Okay. And was there movement of his hands? A. Yes, there was.

Q. As best you can describe, what was the movement of his hands? A. He was rubbing up and down.

Q. In what area? A. In the genitals.

The day after the arrest Dunn discussed the exposure problem with Burton and Police Chief Gordon. Gordon advised Dunn to consult with the county attorney before proceeding further.

Before talking to the county attorney, however, Dunn and Burton showed photographs of Children to Sherry Tweed, Spurgeon's clerk. Tweed could not positively identify Children but she said, "That certainly looks like the man." Burton relayed this information to County Attorney Ronald K. Noah, who advised Burton that he did not think a charge could be filed for the Stevenson's incident but that one could be filed for the Spurgeon's incident.

A complaint was then filed against Children for the incident at Spurgeon's on January 25, 1979. The county attorney investigated the charge but dismissed it about two months later. Eventually, another man was arrested and convicted of the exposures. Children then brought this damage action against Dunn, Burton, and the city.

I. *False arrest.* This is a false arrest case, not a malicious prosecution case. *See Ashland v. Lapiner Motor Co.*, 247 Iowa 598, 75 N.W.2d 357 (1956) (malicious prosecution based on charges filed before justice of peace). A false arrest case involving the issue of probable cause turns on what the officer knew at the time of arrest, not what he learned later. Much of the evidence and argument Children presses upon us would go to a malicious prosecution claim but is not relevant on the *liability* issue in a false arrest claim.

A false arrest is one way of committing the tort of false imprisonment—restraining freedom of movement. Prosser, *Law of Torts* 42 (4th ed. 1971) ("The action for the tort of false imprisonment, sometimes called false arrest, is another lineal descendent of the old action of trespass. It protects the personal interest in freedom from restraint of movement."); *Norton v. Mathers*, 222 Iowa 1170, 1175, 271 N.W. 321, 323 (1937) ("This is a case of false arrest and imprisonment"); *Fox v. McCurnin*, 205 Iowa 752, 757, 218 N.W. 499, 501 (1928) ("although plaintiff has alleged false arrest in count 2 and false imprisonment in count 3, they are not distinguishable, and therefore amount only to a charge of false imprisonment").

The tort requires confinement of the person. *Restatement (Second) of Torts* §§ 35(1)(b), 36 (1965). If *liability* arose for false arrest in this case, it had to arise within the period commencing with the original arrest of Children and terminating with his release on recognizance. Before and after that period he was not confined. The case is different than those in which the plaintiff was kept in confinement because he was not allowed to post bail. Cases of that kind are found in Annot., 98 A.L.R.2d 966, 1031-36 (1964). *Cf. Neves v. Costa*, 5 Cal. App. 111, 118, 89 P. 860, 863 (1907) (no damages while the person on bail).

A. The essential elements of the tort of false arrest are (1) detention or restraint against one's will and (2) unlawfulness of the detention or restraint. *Valadez v. City of Des Moines*, 324 N.W.2d 475, 477 (Iowa 1982); *Sergeant v. Watson Brothers Transportation Co.*, 244 Iowa 185, 196, 52 N.W. 2d 86, 93 (1952); 32 Am. Jur. 2d *False Imprisonment* § 5 (1982); 35 C.J.S. *False Imprisonment* § 1 (1960).

Once a plaintiff shows a warrantless arrest, the burden of proof shifts to the defendant to show justification for the arrest. *Fox v. McCurnin*, 205 Iowa 752, 759, 218 N.W. 499, 502 (1928); *Snyder v. Thompson*, 134 Iowa 725, 730, 112 N.W. 239, 241 (1907); *Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916, 98 S. Ct. 3146, 57 L. Ed. 2d 1161 (1978); *Terry v. Zions Cooperative Mercantile Institution*, 605 P.2d 314, 321 (Utah 1979); 35 C.J.S. *False Imprisonment* § 55, at 735 (1960).

A peace officer in Iowa may make a warrantless arrest when he has

> reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person arrested has committed it.

Iowa Code § 804.7(3) (1979). Indecent exposure is a serious misdemeanor, section 709.9, and therefore is an indictable offense. Iowa Code § 801.4(13) (indictable offense is an offense other than a simple misdemeanor). The question is thus whether Officer Dunn, when he arrested and detained Children, had reasonable ground for believing the offense of indecent exposure had been committed by Children.

B. The expression "reasonable ground" is equivalent to traditional "probable cause." *State v. Mattingly*, 220 N.W.2d 865, 868 (Iowa 1974); *United States v. Berryhill*, 477 F.2d 621, 624 (8th Cir.), *cert. denied*, 409 U.S. 1046, 93 S. Ct. 547, 34 L. Ed. 2d 498 (1972). As stated in *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11, 92 L. Ed. 1879, 1890 (1948):

> Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution to the belief that an offense has been or is being committed.

See also Draper v. United States, 358 U.S. 307, 313, 79 S. Ct. 329, 333, 3 L. Ed. 2d 327, 332 (1959); *United States v. McCulley*, 673 F.2d 346, 351 (11th Cir. 1982).

The test is a "reasonable" ground, not absolute certainty. 6A C.J.S. *Arrest* § 22, at 54 (1976) ("A liberal rather than a strict course should be followed"); § 23, at 56 ("Probable cause necessary to support warrantless arrest does not demand the same strictness of proof as proof of guilt upon trial."); § 24, at 58-59 ("In determining the presence of probable cause for arrest, the courts deal with the probabilities and only the probability, and not a prima facie showing of criminal activity is the standard for probable cause. The probabilities are not technical, but are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause does not require absolute certainty beyond reasonable doubt that a crime is being or has been committed by the person to be arrested; the existence of probable cause is not determined by any analysis of an extent of subjective certainty or processes of the arresting officer, but by an objective standard of reasonableness."). Probable cause can rest on hearsay. 5 Am. Jur. 2d *Arrest* § 46, at 738 (1962); 6A C.J.S. *Arrest* § 23, at 56 (1972) ("Reasonable or probable cause for arrest is not limited to evidence which would be admissible on the issue of guilt, but it may be based on hearsay information.")

When an officer acts with probable cause, he is protected even though the person arrested turns out to be innocent. *State v. Ricehill*, 178 N.W.2d 288, 291 (Iowa 1970), *cert. denied*, 401 U.S. 942, 91 S. Ct. 945, 28 L. Ed. 2d 222 (1971); *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 2d 134, 138 (1959).

Probable cause must be determined on the particular facts in each case. *State v. Harvey*, 242 N.W.2d 330, 340 (Iowa 1976); *State v. Evans*, 193 N.W.2d 515, 517 (Iowa 1972). The significant point is that courts look to the facts within the officers' knowledge *at the time the arrest is made. State v. Vallier*, 159 N.W.2d 406, 408 (Iowa 1969); *State v. Raymond*, 258 Iowa 1339, 1344, 142 N.W.2d 444, 447 (1966); *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142, 145 (1964); *United States v. Tinkle*, 655 F.2d 617, 621 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S. Ct. 1285, 71 L. Ed. 2d 467 (1982); *United States v. Bernhard*, 623 F.2d 551, 559 (9th Cir. 1979); *United States v. Regan*, 525 F.2d 1151, 1155 (8th Cir. 1975); *United States v. Trabucco*, 424 F.2d 1311, 1314 (5th Cir.), *cert. denied*, 399 U.S. 918, 90 S. Ct. 2224, 26 L. Ed. 2d 785 (1970). Facts that occur or come to light subsequent to the arrest are irrelevant to a determination of whether probable cause existed at the time of arrest. *Henry v. United States*, 361 U.S. 98, 103, 80 S. Ct. 168, 171, 4 L. Ed. 2d 134, 139 (1959). As stated in 5 Am. Jur. 2d *Arrest* § 48, at 740-41 (1962):

> The existence of 'probable cause,' justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved.
>
> Probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances that would be sufficient to induce a reasonable belief in the truth of the accusation. It depends on the facts known,

at the time of the arrest, to the person by whom the arrest is made, from which it follows that an arrest cannot be justified by what a subsequent search discloses. On the other hand, if probable cause existed at the time of the arrest, the fact that investigation proves the person arrested to be innocent does not make the arrest unjustifiable.

In determining probable cause, all the information in the officer's possession, fair inferences therefrom, and observations made by him, are generally pertinent; and facts may be taken into consideration that would not be admissible on the issue of guilt.

And as stated in 6A C.J.S. *Arrest* § 25b, at 61-62 (1975):

Conversely, events subsequent to a warrantless arrest will not remove probable cause that existed when the arrest took place. Thus if probable cause exists for an arrest the fact that no crime has been committed, that there is a probability of release of the arrested person, that there has been a dismissal of charges or an acquittal does not affect the legality of the initial arrest.

Probable cause to arrest without warrant is not dispelled by the officer's learning additional facts upon returning to the station house. *People v. Wolfe*, 5 Mich. App. 543, 552, 147 N.W.2d 447, 452 (1967).

C. In dealing with civil damage actions for false arrest, courts apply a probable cause standard less demanding than the contitutional probable cause standard in criminal cases. If the officer acts in good faith and with reasonable belief that a crime has been committed and the person arrested committed it, his actions are justified and liability does not attach. *O'Neill v. Keeling*, 227 Iowa 754, 758, 288 N.W. 887, 889 (1939); *Greer v. Turner*, 639 F.2d 229, 231-32 (5th Cir.

1981); *Dellums v. Powell*, 566 F.2d F.2d 167, 175 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 916, 98 S. Ct. 3146, 57 L. Ed. 2d 1161 (1978); *Hill v. Rowland*, 474 F.2d 1374, 1377 (4th Cir. 1973); *Wilcox v. United States*, 509 F. Supp. 381, 384-85 (D.C.C. 1981); *Gueory v. District of Columbia*, 408 A.2d 967, 969 (D.C. App. 1979); *Mitchell v. Drake*, 172 Ind. App. 376, 381-82, 360 N.E.2d 195, 198 (1977); *Terry v. Zions Cooperative Mercantile Institution*, 605 P.2d 314, 320-21 (Utah 1979); *Town of Jackson v. Shaw*, 569 P.2d 1246, 1250 (Wyo. 1977). The court stated in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1348 (2nd Cir. 1972):

> The numerous dissents, concurrences and reversals especially in the last decade indicate that even learned and experienced jurists have had difficulty in defining the rules that govern a determination of probable cause, with or without a warrant. As he tries to find his way in this thicket, the police officer must not be held to act at his peril. Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest.

II. *Motions for directed verdict and judgment notwithstanding verdict.* We proceed, then, to the question of liability.

A. Before the trial court submitted the case to the jury, defendants moved for a directed verdict. After the jury returned its verdict, defendants moved for judgment notwithstanding

verdict (and new trial). Defendants asserted throughout that Dunn had probable cause as a matter of law to arrest children. The trial court overruled the motions. On review of these rulings, we view the evidence in the light most favorable to Children. *Valadez v. City of Des Moines*, 324 N.W.2d 475, 477 (Iowa 1982) (quoting *Watson v. Lewis*, 272 N.W.2d 459, 461 (Iowa 1978)); Iowa R. App. P. 14(f)(2).

If the pertinent facts on the issue of probable cause were in dispute, the issue was for the jury to decide. The motions for directed verdict and judgment notwithstanding verdict would then be properly denied. *Drake v. Keeling*, 287 N.W. 596, 597 (Iowa 1939); *Snyder v. Thompson*, 134 Iowa 725, 727, 112 N.W. 239, 240 (1907); *Smiddey v. Varney*, 665 F.2d 261, 265 (9th Cir. 1981); *May Department Stores Co., Inc. v. Devercelli*, 314 A.2d 767, 772 (D.C. 1974); *Weissman v. K-Mart Corp.*, 396 S.2d 1164, 1166-67 (Fla. Dist. Ct. App. 1981); *Diaz v. Lockheed Electronics*, 95 N.M. 28, 31, 618 P.2d 372, 374 (1980); *Terry v. Zions Cooperative Mercantile Institution*, 605 P.2d 314, 320 (Utah 1979). If the pertinent facts were not in dispute, however, determination of justification was for the court. *Comstock v. Maryland Casualty Co. of Baltimore*, 179 N.W. 962, 965 (Iowa 1920); *Woodward v. District of Columbia*, 387 A.2d 726, 728 (D.C. App. 1978); *Steinbaugh v. Payless Drug Stores, Inc.*, 75 N.M. 118, 122, 401 P.2d 104, 106 (1965); *McGillivray v. Siedschlaw*, 278 N.W.2d 796, 799 (S.D. 1979); *Terry* at 320; 5 Am. Jur. 2d *Arrest* § 49 (1962).

B. In the case before us, the record is replete with happenings after Children was released. These happenings would be pertinent on liability for malicious prosecution but they do not create liability in the false arrest action for two reasons: first, because Children was not confined at or after the times of

these happenings and second, because of the rule in section 136 of the *Restatement (Second) of Torts* (1965):

> Any subsequent misconduct of one who has taken custody of another by a privileged arrest makes him subject to liability to the other only for such harm as is caused by such misconduct, and does not make him liable for the arrest, or for detention prior to the misconduct.

The evidence introduced by both sides overwhelmingly shows that several exposure incidents had occurred in the mall and that Dunn was aware of them and of the reports in the police records. To confine his background information to the Temple incident of January 25th would be too narrow; his knowledge was broader than that. He also knew that Temple had reported one of the incidents.

Dunn received calls from the dispatcher, first, of an intoxicated person at the mall, and then, that the alleged intoxicated person was the exposure suspect. Dunn went to the mall, discovered that the person was not intoxicated, and did not arrest him. Hawk then said to Dunn, "What'd you leave him go for? He's the flasher. June recognized him."

Dunn did not arrest on this information either. He went to Stevenson's and asked Temple, "Are you sure it's him?" She answered, "yes, yes, I'm sure."

Still Dunn did not make an arrest. He took Temple to the car, knocked on the door or window, and asked her, "Is this the man that was in the store?" She answered, "Yes." Dunn then arrested Children.

Officers confronted with situations such as this one must make a decision. They do not have the luxury of detached reflection before they act. Nor can they conduct extensive investigation and cross-examination out on the street, to see that all the legal elements of the crime are satisfied. They should

be judged in the context of the real world in which they must function. We hold that this arrest was on probable cause.

Having lawfully arrested Children, Dunn had a right to process the arrest and arrange for bail. This he did with the help of Burton. Temple adhered to her identification but another of the clerks disagree. The workup of the evidence in the case would obviously take time. That first evening was preliminary—taking the person into custody and arranging bail. These preliminaries took an hour and twenty minutes. We hold that this retention, following the lawful arrest, was also lawful.

We realize that Children suffered grievously from a mistake, but his claim founded on false arrest is untenable. On the liability issue, we cannot allow our attention to be diverted to events which happened after Children was released. The trial court should have sustained the motion for directed verdict or the subequent motion for judgment notwithstanding verdict.

REVERSED.

All Justices concur except Harris, Larson, and Carter, JJ., who dissent.

HARRIS, J. (dissenting)

The majority concludes as a matter of law there was probable cause for Children's arrest. It does so after an exhaustive review of the facts. The jury, however, on proper instructions, found the facts to be otherwise. We have said:

> In ruling on a motion for directed verdict, the evidence must be viewed in the light most favorable to the party against whom the motion was made, regardless of whether it was contradicted; moreover, a court must draw every legitimate inference in aid of the evidence. If reasonable minds could differ on the issue, it should be submitted to the jury. *See* Iowa R. App. P. 14(f)(2), (17); *Larsen v.*

United Federal Savings & Loan Association, 300 N.W.2d 281, 283 (Iowa 1981); *Beitz v. Horak*, 271 N.W.2d 755, 757 (Iowa 1978); *Curran Hydraulic Corporation v. National-Ben Franklin Insurance Company*, 261 N.W.2d 822, 823 (Iowa 1978).

Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 34 (Iowa 1982). It seems clear to me that reasonable minds *could* differ on the existence of probable cause here. Therefore, the issue was properly for the jury to determine.

The evidence is simply not as compelling as the majority indicates. Contradictions abound. The majority quotes and relies on June Temple's testimony of what she told Officer Burton: "I just had some guy expose himself to me." The majority further quotes her testimony:

> Q. I see. Did you or did you not tell him [Burton] that there was a man in there that exposed himself or words to that effect? [Objection, ruling.] The Witness: Yes, I did.

But Temple contradicted this when she was cross-examined:

> Q. Okay. Did Officer Dunn say to you in sum and substance, "Did you see this man's genitals or his penis or anything of that nature?" A. I don't remember.
>
> Q. Well, this is important now. Do you remember him asking you that? A. No, I don't.
>
> Q. All right. Do you remember telling him at that time that, yes, I did see the man's penis or genitals? A. No.
>
> Q. In fact, you never did tell him that, did you? A. No.
>
> Q. And you never told Mr. Burton that either, had you, prior to that time? A. No, I didn't.

The jury could have found that Dunn arrested Children solely as the person who allegedly exposed himself at Stevensons on January 25. Dunn's answer to the petition and testimony both concede this: "In further answer to plaintiff's petition, this defendant states that the plaintiff's arrest was based upon an incident happening at the Stevenson store in Charles City, Iowa, on the 25th day of January 1979." Dunn testified to the same effect:

> Q. Okay. But you had to arrest him for indecent exposure some place. Where were you arresting him? Where was the place that you claimed at that point before you arrested him where he'd made an indecent exposure? Where? A. Stevensons in the Cedar Mall.

The jury could also have found that Dunn made the arrest without first ascertaining from Temple that Children had actually exposed himself on that occasion. Again, Dunn admitted this in his testimony:

> Q. And June Temple had never told you that she had actually seen any exposure prior to April the 8th, 1979; Isn't that true? A. Yes, that is right.
>
> Q. And on April the 8th, 1979, before you arrested Mr. Children, you never asked her whether she'd seen an exposure either, did you? A. Yes, that is correct.
>
> Q. Yes. That is correct, you didn't ask her? A. Yes.

Dunn conceded that he had insufficient probable cause to arrest Children after first determining that Children was not intoxicated, despite the dispatcher's report that Children was the flasher suspect. The jury could therefore have concluded that Dunn did not have reasonable grounds to believe that an exposure had occurred on January 25, and that his arrest of Children, based solely on *that* incident, was unlawful.

We have said that it is "for the *jury* to pass upon [conflicting testimony] under proper instructions from the court." *Jettre v. Healy*, 245 Iowa 294, 298, 60 N.W.2d 541 (1953) (emphasis added). The trial court should not be reversed for sending the disputed questions to the jury.

I would affirm.

Larson, and Carter, JJ., join this dissent.

APPENDIX B

IN THE SUPREME COURT OF IOWA

PETER CHILDREN,

Appellee and Petitioner
for Rehearing,

vs.

JAMES R. BURTON, VICTOR DUNN,
AI D CITY OF CHARLES CITY, IOWA,

Appellants.

422
66367

Appeal from Bremer District Court—
B.C. Sullivan, Judge.

Appellee and Petitioner

PETITION FOR REHEARING

Peter Children, the plaintiff and prevailing party below and the appellee and losing party before this Court, respectfully petitions for rehearing of this Court's decision of March 16, 1983, pursuant to Iowa Rule of Appellate Procedure 27. The principal grounds for review are:

A. The majority opinion has recited material facts contrary to the evidence and in fact has used a falsified police record in support of its decision holding that the police had probable cause.

B. The majority has confused the grounds for probable cause for arrest with grounds for a *Terry* stop, thus severely jeopardizing the rule of law and the privacy of the people of Iowa.

C. The majority has apparently severely restricted the cause of action for false arrest without giving the citizenry of Iowa a reasonable alternative tort action, inasmuch as the malicious prosecution case cited by the majority is factually and legally inapposite.

D. The Court's construction of probable cause for a warrantless arrest violates Amendments IV and XIV of the United States Constitution.

E. In the alternative, the case should be remanded for trial on the theory of outrageous conduct.

DISCUSSION

I. The Supreme Court's function, under the Iowa constitution, in reviewing cases at law is a limited one: "The Supreme Court . . . shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe . . . . Iowa constitution, Art. V, Sec. 4. It can only try a case anew in equity. *In re Gauch's Estate*, 308 N.W.2d 88, 90-91 (Iowa 1981); *In re Johnson's Estate*, 220 Iowa 328, 261 N.W. 908, 262 N.W. 488 (1935).

In the majority opinion, the Court has acted contrary to these constitutional limitations by substituting its judgment for that of the jury on disputed factual matters. Most strikingly, the majority has cited a fabricated and falsified record of the Charles City Police in support of its conclusion that

Officer Dunn had probable cause for the arrest. Beyond this, the majority has only marshalled portions of the record favorable to the defendants in rendering its opinion, contrary to the rule in this State that the facts are to be viewed in the light most favorable to the plaintiff, the prevailing party below.

In essence, the majority gives a police officer in this State the right to arrest a person on a general suspicion that the person is a criminal, irrespective of whether or not the officer has *any* information that a specific crime has been committed. Assuming that the facts central to the majority's holding are found on page 18 of the opinion, this Court has just held that a person can be arrested because someone says he is "the flasher." The logical inference is that a citizen of Iowa can now be lawfully arrested if someone tells a police officer that he is "the murderer," or "the robber," or even "the criminal." According to the majority, the arrest is valid, irrespective of whether or not the accuser or the officer has any specific information of any sort about the actual commission of a crime.

The majority states: "Nor can they conduct extensive investigation and cross-examination out on the street, to see that all of the elements of the crime are satisfied." Opinion, p. 18. The opinion raises a serious question for the privacy of the citizenry. Which elements of the crime need not be ascertained? Does the officer have to have reasonable grounds that *even one element* of the crime is present? This Court has just said, No! Officer Dunn had no evidence (hearsay or otherwise) that a crime had been committed and that Peter Children committed it.

Turning to the more detailed statement of facts, the majority opinion makes several fundamental errors of fact:

1. The majority opinion suggests that it *could be inferred* that Children was arrested by Dunn as being the person who

committed several different exposures. Opinion, p. 17-18. The uncontroverted testimony of Dunn was that he arrested Children specifically because of his belief that Children committed an indecent exposure at Stevenson's in the Cedar Mall on January 25, 1979. (A. 765) The evidence is that Dunn was never involved in the investigation, never interviewed any witnesses, Temple never told Dunn what she actually saw, Dunn never asked her, and Dunn knew that he should ascertain all elements of the crime, including an actual exposure. (A. 755-56).

2. The majority quotes a purported memo to the police file of Officer James Burton:

> "Stevenson's 1-25-79. June Temple. 5'8" - 5'9" Dirty dishwasher Blonde Hair or Grey. 34-35 years old. Down on his knees with both hands inside his pants jacking off."

The majority implies that Dunn had seen this memo in the police record. Opinion, p. 3. The record clearly indicates that this memo was placed in the file by Officer Burton approximately *one year after the alleged exposure and nine months after the arrest.* (A. 315-16, 1157, Ex. 25). Temple denies that she saw an exposure or a man with his hands inside his pants masturbating. (A. 634-37, 650-52, 1268-70). The fact is that Burton fabricated this evidence after this lawsuit was filed.

> Q. (By Hawkins): So you made this note up recording what June Temple said on that day a year after the incident, right? A. By Burton: Yeah. You can even see on the 1-25-79 there was an 8, and I put it then to '79.
>
> Q. Okay. So the incident happened on June—on April the 8th, 1979—excuse me—it happened on January the 25th of 1979, and so somewhere around January of 1980,

this year, you put these two notes into the file; is that right? A. I'm not sure the exact day, but it seemed like a year later.

Q. Of course, this is after the City had been sued, and you'd been sued? A. That's correct.

(A. 316) In fact, Burton also fabricated the police memo regarding Sherry Tweed and Spurgeons. (A. 312-13).

3. The Court places reliance on evidence that June Temple casually conversed with Officer Dunn about the "incidents". Opinion, p. 3. Officer Dunn testified that he relied on June Temple's identification of Children in making the arrest. (A. 740-41). June Temple denies telling Dunn that she had seen Children expose himself. (A. 663). There is no evidence in the record that June Temple ever talked with Dunn or anyone else about any knowledge of other incidents.

4. The majority states that June Temple told Patrick Hawk that Children was the "flasher." Temple denies telling Hawk that Children was the "flasher" or the "exposer." (A. 641). The majority quotes Hawk and David Fisher on this point, *but fails to mention Temple's denial of the conversation.*

The majority has simply gleaned some facts and made some inferences from the record favorable to the defendants, the losers below. This is contrary to the rules of law this Court is supposed to uphold.

II. The majority suggests that Dunn has no reasonable alternative available than to arrest Children. This is factually and legally untrue. Dunn knew that Children was accused by someone of being an exposure suspect by reason of a radio dispatch. Dunn initially ascertained Children's identity and then let him go. After talking to Hawk and Temple, Dunn knew no more: Children was still an exposure suspect. There

is no evidence that Dunn arrested children because he could not ascertain Children's identity. In fact, Dunn believed Children was who he said he was. (A. 169). But even if the Court were to indulge in that assumption, the proper procedure was not followed as a matter of law and of Charles City Police practice. Previously, someone had identified a local man as the exposure suspect, based on the Mason City composite. The Charles City Police did not arrest the man; they merely ascertained his identity. (A. 331-34). In fact, if the identity of a person is questioned, this Court, as well as the Supreme Court of the United States, has stated proper procedure: a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) states that a person may be briefly detained against his will on the basis of reasonable suspicion "while pertinent questions are directed to him." *State v. Coley*, 229 N.W.2d 755 (Iowa 1975) and *Loyd v. Douglas*, 313 F.Supp. 1364 (S.D. Iowa 1970), make clear that Dunn had the right to detain Children briefly to ascertain his identity. Dunn in fact did make a *Terry* stop and found out who Children was. Dunn then had the information needed to make a proper investigation. Nevertheless, Dunn proceeded to arrest Children without asking Temple the one critical question he did not know before: DID YOU SEE AN EXPOSURE COMMITTED?

This was not a "hot pursuit" situation. Children was not in flight. Children cooperated with Dunn in identifying himself. There is no basis for telescoping a *Terry* stop situation into a rule stating that Iowa law enforcement officers can arrest a person without inquiry into whether a crime had been committed.

III. On page 10 of its Opinion the majority suggests that this case is one of malicious prosecution, citing *Ashland v. Lapiner Motor Co.*, 247 Iowa 598, 75 N.W.2d 357 (1956). The

Ashland case is inapposite as a matter of fact and law. *Ashland* involved an attempt by a private company to collect a debt by use of the criminal process. Under the procedure existing at that time, the company filed a complaint with the Justice of the Peace and had the Sheriff arrest and jail the defendant. After the debt was adjusted by agreement of the parties, the defendant to the criminal action was released from jail and no further proceedings were had. The *Ashland* case was not against the municipality. It was against the corporation who sought it to collect the debt. Moreover, the Supreme Court suggested that the same facts could be the basis for an action for abuse of process. 75 NW.2d at 360.

The principle distinction between *Ashland* and this incident case is that in *Ashland* the arrest and detention and subsequent settlement of the civil dispute occurred as a direct result of the filing of the information. In this case, no substantial damage was incurred by Children after the filing of a complaint charging him with exposure at *Spurgeons*.

More importantly, the criminal procedure has drastically changed since *Ashland* as a result of a recent complete revision in the Criminal Code and the Rules of Criminal Procedure.

This case is not one for malicious prosecution. An essential element of that action is a previous prosecution. Iowa Code, § 801.4 (12) defines "prosecution" as the commencement, including a filing of complaint, and continuance of a criminal proceeding, and pursuit of that proceeding to a final judgment on behalf of the State or other political subdivision. Under Section 804.1, an action is normally commenced by a filing of a complaint before a magistrate, and then the magistrate, when it appears from the complaint or affidavits that there is probable cause to believe an offense has been committed and the

designated person has committed it, issues a warrant for the arrest of such person. Section 804.22 states that when an arrest is made without a warrant, the person arrested shall without unnecessary delay be taken before the nearest and most assessable magistrate, and the grounds on which the arrest was made shall be stated to the magistrate by complaint, subscribed and sworn to by the complainant, or supported by the complainant's affirmation, and the magistrate shall proceed with the case.

Rule 2 of the Iowa Rules of Criminal Procedure states that whenever an arrest is made without a warrant "The *magistrate shall,* prior to further proceedings in the case, *make an initial, preliminary determination* from the complaint, or from an affidavit or affidavits filed with a complaint or from an oral statement under oath or affirmation from the arresting officer or other person, whether there is probable cause to believe that an offense has been committed and that the defendant has committed it. The magistrate's decision in this regard shall be entered into the magistrate's record of the case." The next step prescribed by Rule 2 is that the magistrate shall inform the defendant that he is entitled to a preliminary hearing. *None of this procedure was followed in this case.*

The arrest itself was invalid as being without reasonable grounds. The complaint subsequently filed in the case charging Children with exposure at *Spurgeons* is also invalid because neither the complaint nor the supporting affidavits states facts constituting a violation of Section 709.9 of the Code of Iowa. There is no allegation of any person to whom *Children* allegedly showed his private parts nor any allegation of lascivious intent, or arousal of the person to whom Children allegedly exposed himself. A complaint with similar defects was held

invalid recently in *State v. Thorton*, 300 N.W.2d 94, 96 (Iowa 1981).

The magistrate's record shows no determination of probable cause at any time. Further, the record of the Court proceeding shows no further attempt on the part of the State to prosecute the case. There was no preliminary hearing, no arraignment, no movement by the State of any kind. The file discloses only motions by the defendant and a subsequent dismissal of the complaint.

Restatement, Second, Torts, Section 654 states the basic manner in which one can determine whether or not criminal proceedings had been instituted. Comment (d) of this section states, "The mere fact that a person has submitted to a magistrate an affidavit for the purpose of securing a warrant for another's arrest or a summons for him to appear at a hearing, does not justify a finding that he has initiated criminal proceedings against the other." Comment (e) to that section states, "If the arrest is not a valid one, *an action for malicious prosecution will not lie unless some further step is taken*, such as bringing the accused before a magistrate for determination whether he is to be held. If there is nothing more than the false arrest and the accused is released without any further proceeding, *his remedy is an action for false imprisonment.*"

There was also some suggestion by the defendants that Children's action was one for defamation. An essential element of defamation is a false statement. Truth of the statement is the defense to defamation. The statements made by Chief Gordon and published in the newspaper articles and radio and television broadcasts are essentially true. Children was arrested and he was charged by the police.

It has always been the law of Iowa that when the damages complained of result from a warrantless arrest, the essence of

the matter is the warrantless arrest. Such facts do not support an action for malicious prosecution. *Snyder v. Thompson*, 134 Iowa 725, 112 N.W. 239, 241 (1907).

IV. The majority has also cited Restatement, Second, Torts, Section 136 to the effect that the subsequent misconduct of one who is taken custody of another by a privileged arrest makes him subject to liability to the other only for such harm as is caused by such misconduct, and does not make him liable for the arrest. It is unclear as to whom this statement is directed. If it is directed to Officer Burton, it still does not exonerate the City of Charles City, who is responsible for the entirety of the sequence of events. An examination of the publicity that caused Children his principle damage, shows that Chief Gordon told the press about the arrest and what Children was charged with, and did not tell the press about any subsequent complaint lodged with the magistrate charging Children with an exposure incident at *Spurgeons*. *See* Appellee's Brief, pp. 15-17.

Publicity or notoriety incident to the arrest are considered to be damages proximately flowing from an arrest in Iowa. *Young v. Gormley*, 120 Iowa 372, 94 N.W. 922, 923 (1903); *McVay v. Carpe*, 238 Iowa 1131, 29 N.W.2d 582, 587 (1947); *Nelson v. Steiner*, 262 N.W.2d 579, 584 (Iowa 1978). The subsequent filing of a complaint does not stop damages for false arrest, but rather it may enhance them. *Nelson v. Steiner*, 262 N.W.2d 579, 584 (Iowa 1978), declares that the jury can consider, in determining damages from a false arrest, whether an information or complaint filed as a result of the arrest is public record. Indeed, Comment (g) to Restatement Second, Torts, Section 136 states, "If the actor insists on releasing the other against his will, the actor is liable for any harm to the other's refutation which the absence of an official

reputation may cause, for any bodily harm which the other suffers from his release, and for any expense which he is forced to incur in consequence thereof."

V. If this Court is going to severely restrict the cause of action for false arrest, departing from its clearly enunciated previous standards, then this cause should be remanded to the District Court for retrial on the issue of outrageous conduct. This cause was sufficiently stated in Count III of the initial Petition filed on September 7, 1979. (A. 1-10).

VI. The construction of probable cause for a warrantless arrest given by the majority violates the provisions of Articles IV and XIV of the United States Constitution. The idea of no arrest without probable cause is a fundamental cornerstone of the privacy rights of the citizenry. This holding of the majority states that an officer can arrest a citizen without having any basis for believing that a crime actually has been committed by that person. In effect, the police in Iowa now have a cart blanche to arrest anyone on any pretense. This the Constitution forbids.

CONCLUSION

Plaintiff respectfully requests that this Court reconsider the matters stated herein and affirm the trial court below.

Respectfully submitted,

LEX HAWKINS
GLENN L. NORRIS
GEORGE F. DAVISON, JR.
HAWKINS & NORRIS
2801 Fleur Drive
Des Moines, IA 50321
Telephone: 515/288-6532
Attorneys for the Appellee
and Petitioner for Rehearing

APPENDIX C

IN THE SUPREME COURT OF IOWA

No. 66367

PETER CHILDREN,

Appellee,

vs.

JAMES R. BURTON, VICTOR DUNN,
AND CITY OF CHARLES CITY, IOWA,

Appellants.

ORDER

After consideration by the court en banc, Wolle, J., taking no part, appellee's petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 18th day of April, 1983.

THE SUPREME COURT OF IOWA
By W. W. REYNOLDSON,
Chief Justice

Copies to:
Lex Hawkins, Glenn L.
Norris and George F.
Davison, Jr., Lawyers
2801 Fleur Drive
Des Moines, IA 50321
Walter C. Schoeder, Lawyer
119 Second Street, N.W.
Mason City, IA 50401
Don W. Burington, Lawyer
300 Mutual Federal Building

P.O. Box 1567
Mason City, IA 50401
Jim DeKoster and
E. R. McCann, Lawyers
500 Waterloo Savings Bank Building
P.O. Box 1200
Waterloo, IA 50704
Ms. Sam Purpora
Mead Data Central
P.O. Box 933
Dayton, Ohio 45401

APPENDIX D

Iowa Rules of Criminal Procedure
Rule 2.

1. *Initial Appearance of Defendant.* An officer making an arrest with or without a warrant shall take the arrested person without unnecessary delay before a committing magistrate as provided by law. When a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith. If the defendant received a citation or was arrested without a warrant, the magistrate shall, prior to further proceedings in the case, make an initial preliminary determination from the complaint, or from an affidavit or affidavits filed with the complaint or from an oral statement under oath or affirmation from the arresting officer or other person, whether there is probable cause to believe that an offense has been committed and that the defendant has committed it. The magistrate's decision in this regard shall be entered in the magistrate's record of the case.

2. *Statement by the Magistrate.* The magistrate shall inform a defendant who appears before the magistrate after arrest, complaint, summons, or citation of the complaint against defendant, of the defendant's right to retain counsel, of the defendant's right to request the appointment of counsel if the defendant is unable by reason of indigency to obtain counsel, of the general circumstances under which the defendant may secure pretrial release, of the defendant's right to review of any conditions imposed on the defendant's release and shall provide the defendant with a copy of the complaint. The magistrate shall also inform the defendant that he or she is not required to make a statement and that any statement made by the defendant may be used against him or her. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel.

See Fed R. Crim. P. 4(a), 5 and 5.1 for similar provisions.

Iowa Code (1979)

§ 804.1 *Arrest by warrant—complaint and citation defined.* A criminal proceeding may be commenced by the filing of a complaint before a magistrate. When such complaint is made, charging the commission of some designated public offense in which such magistrate has jurisdiction, and it appears from the complaint or from affidavits filed with it that there is probable cause to believe an offense has been committed and a designated person has committed it, the magistrate shall, except as otherwise provided, issue a warrant for the arrest of such person.

See Fed. R. Crim. P. 3, 4(1), 9(a).

Iowa Code (1979)

§ 804.7 *Arrests by peace officers.* A peace officer may make an arrest in obedience to a warrant delivered to the peace officer; and without a warrant:

1. For a public offense committed or attempted in the peace officer's presence.

2. Where a public offense has in fact been committed, and the peace officer has reasonable ground for believing that the person to be arrested has committed it.

3. Where the peace officer has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it.

4. Where the peace officer has received from the department of public safety, or from any other peace officer of this state or any other state or the United States an official communication by bulletin, radio, telegraph, telephone, or otherwise, informing the peace officer that a warrant has been issued and is being held for the arrest of the person to be arrested on a designated charge.

See 18 U.S.C. §§ 3050, 3052, 3053, 3056, and 3061; 26 U.S.C. §§ 7607, 7608(a) and 7608(b).

Iowa Code (1979)

§ 804.22 *Initial appearance before magistrate—arrest without warrant.* When an arrest is made without a warrant, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the judicial district in which such arrest was made, and the grounds on which the arrest was made shall be stated to the magistrate by complaint, subscribed and sworn to by the complainant, or supported by the complainant's affirmation, and such magistrate shall proceed as follows:

1. If the magistrate believes from such complaint that the offense charged is triable in his or her court, the magistrate shall proceed with the case.

2. If the magistrate believes from such complaint that the offense charged is triable in another court, the magistrate shall by written order, commit the person arrested to a peace officer, to be taken before the appropriate magistrate in the district in which the offense is triable, and shall fix the amount of bail or other conditions of release which the person arrested may give for his or her appearance at the other court. *See* Fed. R. Crim. P. 4(a), 5(a) and (c), and 5.1(a).

Iowa Code (1979)

§ 811.2 *Bail.*

7. *Failure to appear—penalty.* Any person who having been released pursuant to this section, willfully fails to appear before any court or magistrate as required shall, in addition to the forfeiture of any security given or pledged for the person's release, if he or she was released in connection with a charge which constitutes a felony, or while awaiting sentence or pending appeal after conviction of any public offense, be guilty of a class "D" felony. If the defendant was released before conviction or acquittal in connection with a charge which constitutes any public offense not a felony, the defendant shall be guilty of a serious misdemeanor. If the person was released for appearance as a material witness, the person shall be guilty of a simple misdemeanor. In addition, nothing herein shall limit the power of the court to punish for contempt.

See 18 U.S.C. § 3150.

Iowa Code (1979)

§ 811.7 *Recommitment after bail.*

1. The magistrate may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after the defendant has given bail or deposited money in lieu thereof, or otherwise is released pur-

suant to this chapter, when it satisfactorily appears to the court that the defendant has failed to appear as required, or the defendant has violated a condition of release, or when, after the filing of any indictment or information, the court finds the bail taken or money deposited is insufficient.
See 18 U.S.C. § 3143.